No. 15,072

United States Court of Appeals
For the Ninth Circuit

PEGGY LOU RIKER and FREDA H. GRASSMEE,
Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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To the Honorable Chief Judge Denman, Circuit Judge Fee, and District Judge Ross:

The above named appellants, Peggy Lou Riker and Freda H. Grassmee, request and petition for a rehearing in the above entitled matter from the decision made and filed April 12, 1957.

Pursuant to Rule 23 of this Court, the appellants suggest that because of the far-reaching effect, and the importance of the matters decided in the majority decision, the case should be heard en banc.

For grounds of this petition, your appellants respectfully show the following grounds:

FREEDOM OF RELIGION.

Both the appellants' cases involve gifts of money to a third party for religious purposes of a particular

church. Both involve gifts made with specific written directions that the money was given for the religious purposes (Ex. 8, Church form 399).

A donor under Sec. 23 (o) is permitted a 15% deduction from gross income, for charitable, religious and other contributions.

A gift is deductible under Sec. 23 (o) when made to a fund organized and controlled by a non-exempt organization, where the purpose of the fund is within this section.

Faulkner v. Comm. (CCA-1) 112 Fed. 2d 987.

Indeed, most gifts in trust for religious, charitable or other purpose are made to a bank or trust company, or other trustee who is not in any sense of the term an exempt organization under any tax laws. The terms of the trust determine whether the trust is or is not within Sec. 23 (o).

Notwithstanding this basic principle of law, this decision in the case at bar turns the question of deduction under 23 (o) as to whether the trustee under the express trust is an exempt organization and that the ecclesiastical organization of the spiritual body is also not tax exempt because part of its activities involve application and the spreading of Christianity by unconventional means of applying its teachings to everyday life rather than to talk or sing about them.

Not only were the gifts involved made under direct written statements transmitting the funds to the recipient in trust for religious purposes (Ex. 8) but also the church laws under which the donee-trustee

received the gift provides that all money and property must be held under a trust for religious purposes (Finding Rp. 82; Canon Law 20, Rp. 52) and the church organic laws contain numerous safeguards and remedies to guarantee the use of the money under this trust solely for the religious purposes.

It is a basic concept of our law, and United States Constitution, Amendment 1, that the government does not prefer one religion over another. The deduction of Sec. 23 (o) is applicable regardless of the spiritual body or identity of the religion to whom this money is given in trust for religious purposes.

A.

Should it be the law that a donor will or will not be granted the deduction of Sec. 23 (o) for gifts for religious purposes, and therefore taxed a greater sum depending upon the particular religious or spiritual body or ecclesiastical organization exercising discipline over the particular religion, then the very basic and important concept of freedom of religion is subject to a material limitation. Insofar as the decision involved in this case turns taxability of a gift in trust for religious purposes upon either the exempt status of the donee-trustee or the organization exercising discipline over the spiritual body of the church or the particular religious beliefs, this decision has a very far-reaching effect.

B.

A major part of the decision turns upon a denial of the Section 23 exemption because the spiritual body's

organization and the committee as its agent as a means to attain the spiritual purposes of the church, engage in activities in which portions of the costs are deferred by the related income of the activity through charges to the public. On page 14 of the decision, it is stated "Even though the church and its members may have lauded the spiritual end of these enterprises and turned a blind eye to the profits and it remains the fact that much of the life blood" came from these activities.

It would therefore appear that if the spiritual organization and its committee had confined its activity to study of religion and spread of religion by verbal means, and not have extended its spiritual activities to showing and proving by precept and example for others to view, that Christianity is applicable to everyday life, that the gift would be deductible under Sec. 23 (o), and by dictum the church committee would be tax exempt.

It therefore appears that so long as one holds religious views which are practiced only by words, written, spoken and sung, that the party is entitled to a Sec. 23 (o) deduction from his gross income, and the church and its organization entitled to the subdivision 6 tax exemption. However, if the particular religious organization believes that its religion can be and should be applied to everyday life, and attempts to prove it and to spread its religion through this means, then those belonging to the particular church or holding its belief are denied the 23 (o) deduction, and the religious organization is therefore penalized. Stated

simply, so long as religion is confined to verbalizing, it is tax exempt. Whenever a religion teaches that religion is something that can be used and applied to everyday life, and undertakes to demonstrate it, then this religion is to be penalized; the life blood of the church organization is to be struck and cut off by taxation not otherwise extended to churches and other religious organizations, and those who make gifts not for this particular activity, but only in trust for the religious purpose of this particular belief, are to be taxed at a greater rate by denial of the 23 (o) deduction.

C.

The decision on page 14 after commenting that the church and its members have lauded the spiritual end of the activities, and turned a blind eye to the profit end, observes that a church activity conducted by Riker, would in the Court's opinion not permit those coming in contact with the public to effectively demonstrate or show this particular religious application. The decision then follows with the comments that the garb of a cook or a waiter, and the casual relationship between the student ministers and the patrons, seem poorly designed to spread the fame of their order.

We might also observe that the difference between profanity and prayer differs little in the vocabulary, but principally in the manner and attitude in which the words are spoken or used. We should also observe that the garb of a clergyman can also cloak a saint or

a sinner, and that clothes do not necessarily make the man. Undoubtedly a uniform will make a soldier on the parade grounds, and undoubtedly assists in battle; but when battle is the payoff, it is not the garb of the soldier that keeps the man in the face of death or imminent danger from running. The thing that distinguishes between a coward and a soldier is not the garb, but the man; it is the character and training not the dress; it is the substance not the form that determines these things. So in this particular religion, it is the manner and attitude in which a person does everyday life activities that determine whether he is a saint or a sinner. It was never in prior decisions or the intention of Congress enacted in statute that the 23 (o) deduction to a donor would or would not depend upon whether the particular religion did or did not use an effective means to spread the particular religious beliefs.

This decision has a far-reaching effect when it holds that the person making a gift for religious purposes will or will not be entitled to a 23 (o) deduction, and therefore be taxed greater or less depending upon his or her religious beliefs, and whether these religious beliefs are disseminated by means which the particular judge or administrative official applying the law considers to be effective means.

D.

A basic premise in the laws and political institutions in this country, is that a person may believe that which he wishes in matters of religion without govern-

mental interference because of that religious belief. In the case at bar, both Riker and Grassmee are denied the Sec. 23 (o) deduction, and therefore taxed more than others who make comparable gifts to other trusts for religious purposes, simply because the religious beliefs are those held by persons who comprise a group under the common discipline of an ecclesiastical organization using a particular form of church government. The test turns, therefore, upon the particular spiritual organization of the particular groups holding a religious belief.

In the case at bar, it appears that if the spiritual head of the organization has more powers or authority than another church organization, the particular differential in taxation applies. So if Miss Nordskott, the Senior Elder of this particular church for the past number of years, as ecclesiastical head of the church has power to supervise and veto the acts of other ecclesiastical officers, etc., and the advisory board is elected by the convention but may serve only if confirmed by the Senior Elder, and this board can only exercise authority granted them by Miss Nordskott as Senior Elder, and the College of Pastors have only such powers and duties as may be prescribed in writing by Miss Nordskott as Senior Elder, and this Senior Elder has control in ecclesiastical matters over the temporal agencies, it appears that the actual vesting of this power in Miss Nordskott as Senior Elder therefore has the effect of making gifts in trust for religious purposes of that church not deductible, and would and does make the Committee sub-

ject to this ecclesiastical control, taxable. The Reply Brief page 7, et seq., points out that the form of church government does not determine whether donations for the church's religious use are or are not deductible under Sec. 23 (o) and that there are in general three forms of church government, of which the classification of episcopacy or prelacy is but one.

57 C.J. 7, Religious Societies 4;

Watson v. Jones, 80 U.S. 679, 20 Law. Ed. 666.

The form of ecclesiastical organization has not heretofore been any test for determination of a Sec. 23 (o) deduction. A gift need be only for religious use, and Congress did not intend to restrict this deduction for religious use to those of churches having any particular form of ecclesiastical church government.

A far-reaching effect of this decision is that gifts in trust to a religious use will be allowed as a deduction under Sec. 23 (o) depending not only upon the practices of a particular religion, and its effectiveness in spreading religion, but also upon the particular form of church government used by the particular church.

We urge that the Court consider the basic assumptions heretofore applicable to religious freedom, that a person may hold any particular religious belief without suffering additional taxation therefor. A person may belong to a religious society, and should not be penalized by paying additional taxes because the particular church uses a certain means or form of spreading religion by applying it to everyday life. A person may hold any religious belief, and should not

be taxed at a greater sum than another, simply because this person makes donations for religious use, in trust, to a church that uses a particular form of church government or organization. No test of taxation, and no computation of taxable income should depend upon any person's particular church's belief, church organization or religious practices. So long as a church organization does not damage, injure or hurt another, it should without restriction be permitted to use whatever lawful means are at hand or that the church wishes to apply to spreading of its religion, whether entirely confining its activities to verbal acts, or to actually applying the religious belief to everyday life.

EXEMPT ORGANIZATIONS.

Although we pointed out in the appellants' briefs that the wording of Sec. 23 (o) and Sec. 101 sub. 6 are identical, in actual judicial construction there were different rules applicable. We point to our briefs for the collection of authorities.

The particular decision in this case has very far-reaching and important implications, in that it holds any activity in which there is sought money or profit, even though this be connected with and a part of the spiritual purposes, is in fact sufficient to deny the particular church its exemption.

The factual statements show that the church and its members laud and consider the spiritual ends of the activities applying Christianity to everyday life,

and turn a blind eye to the profit end. The record shows that in fact there was no profit financially in any of the periods involved, from any of these operations, and in fact the costs of conducting them were more than the related income that was a by-product of these spiritual activities using this particular means to apply and spread Christianity.

This particular decision holds, and it is precedent for, the denying of a Sec. 23 (o) exemption to any person making a gift in trust for religious purposes of any church in which any organizations under the ecclestiastical control of that church does any activity for which charges are made. The spiritual organization is also taxable.

This means that the Church of Latter Day Saints, the Mormon Church, with its far-flung interests, some of which are engaged in clearly commercial enterprises, will be and must be taxed, and all gifts and tithes to the church for religious purposes are taxable and not deductible as a charitable or religious donation.

This means that the Christian Science Church, because it maintains large newspapers and a publication society, and sells newspaper and advertising space to the public, will be within this category and the donors denied the religious deduction.

This means that the Catholic Church, the established church of Rome, because it has within it organizations under its ecclestiastical control, organizations engaged in activities that make charge to the

public, as for an example the Christian Brothers Winery, will also fall within this category.

It means that any church that has a publication society that sells publications, would and must fall within this classification, even though the spiritual end is the main consideration, and a blind eye is turned toward the profit end.

It means that every church which, as part of its activities, has any organization or agency subject to its ecclesiastical control that runs a hospital making charges for its services, must be and is also within this classification.

Page 8 of the decision points out that Canon Law 3 grants control to the spiritual body over the organizations acting in temporal matters for the church, even if these ecclesiastical determinations directly or indirectly affect the temporal matters.

This is a statement of the general principles of law applicable to all churches, and the spiritual body does and must control those under it who hold or act in property matters within the sphere or under the discipline of the particular spiritual body.

Ecclesiastical control by the spiritual body's organization often does affect the property matters of the various agencies or entities acting within the organization. For example, a parish or congregation may be divided which in effect terminates the organization acting for and holding property within that jurisdiction of the spiritual body, and two or more entities are in fact created as illustrated in the case of

Wheelock v. First Presbyterian Church, 119 C 477. There may be a schism or division in religious beliefs or organization, in which the spiritual body then recognizes and supports one of the factions. The effect of this is that the property follows the particular group or organization recognized by the spiritual body. For an example of this, see *Watson v. Jones,* 80 U.S. 679. All ecclesiastical organizations controlling the spiritual body of a particular religious organization, actually exercise ecclesiastical control over the various entities under its discipline. In the case at bar, the ecclesiastical organization headed by Miss Nordskott, as Senior Elder, is authorized to and does exercise this ecclesiastical control over the various parts of the organization. One part of the church organization, and the one involved in this litigation, is the activity where those engaged full time in the Church's work live in an apostolic society to enable them to give their time. This is but a part of the total membership and but one of the various activities of this Church.

The decision in the case at bar has far-reaching effects and implications in that it holds mere ecclesiastical control of but one activity within the entire spiritual body, which is held not to be an exempt organization, bars the Sec. 23 (o) deduction to any donor in trust for religious purposes of the religious movement.

APOSTOLIC SOCIETIES.

The opinion of the Court in the case at bar shows and states on page 18 of the decision that the portion of the church membership living in the apostolic society, has no tangible or property interest in the activities of the church. Yet the opinion of the Court and the concurring opinion of Chief Judge Denman denies the 23 (o) exemption because the apostolic society actually supports its members engaged in the church work.

When we consider that this is but a portion of the total membership of the religious society, and constitutes only those who are working full time in the church's work, we have a situation where the receipt of the barest necessities to enable a person to work full time in the church's work disqualifies any gift under Sec. 23 (o).

The holding of this decision has, therefore, far-reaching effects.

In our society, a church can only operate when it has money. This is the life-blood of its activity. It follows that in any religious organization, if any of those giving their services receive so much as their meals or any benefit to permit them to carry on the work, therefore the organization is no longer exempt, and all donations are no longer subject to the deduction of Sec. 23 (o). A stronger situation is where any person receives compensation or pay for these services.

The various cases cited in appellants' brief involving apostolic societies, sometimes arise when a person

who has been or is a member seeks to obtain a portion of the money or property in the common community treasury. These cases uniformly hold that there is no right of recovery. The case at bar in effect holds that in an apostolic religious organization where the members do not have a tangible and actual interest and contract right in the common community treasury and its income, then the Subdivision 18 provisions do not apply.

We should point out the inconsistency appearing in this decision, first that Grassmee and Riker are taxable because they have benefits accruing to them because they are provided the necessities of life to permit them to carry on their church work. Yet, under the provision of Sub. 18, this interest that they have which disqualifies them and the organizations for the ordinary tax classification of a church, is shown and held to be no more than spiritual comfort and the association in the religious group and its doctrines.

DEPENDENCY DEDUCTION.

The case at bar held that Mrs. Grassmee, who gave all, or substantially all of her personal earnings at private employment to the church Committee in trust for religious purposes, was not entitled to the Sub. 23 (o) deduction because part of this money she gave enured to her benefit. Yet because her mother lived in this group, and received her support from the church Committee, because of

her dependency upon Mrs. Grassmee, she can claim no credit for support of her mother. We need then ask who supported the mother? If Mrs. Grassmee had given this money to a commercial institution in return for the support of herself and her mother, she would certainly be entitled to credit for the dependency support. If the donation enured to the benefit of Mrs. Grassmee and her mother and others in the group, which is the holding of the majority decision, it would therefore follow the mother received some benefits which were support of her by Mrs. Grassmee. If the money was given, we then ask does the mother's care fall within a charitable institution's support, or is it part of this benefit that enured to the donor, the daughter of this woman supported?

RIKER.

Mrs. Riker conducted the activity at San Bernardino, as the spiritual head and leader of a group of 12 to 17 persons. It was the services of this group that created this activity, and the $8,900 held taxable to her was the product of these 12 to 17 persons' services. No deduction was made from this $8,900 shown in her tax return for any of the services or the cost of support or maintenance of these 12 to 17 persons while they were performing these services and engaged in this religious activity. All gross receipts of the activity were immediately deposited in the name of the Committee. All money for expenses were supplied by the religious Committee through the local

project fund. Riker, if she is charged with this $8,900 as personal income, which was not the total sums paid to the church, but only a fraction of it, should have deducted all actual expenses of the Committee spent for the food, clothing, housing, etc. of the 12 to 17 persons whose services were engaged in this activity as well as other deducted costs paid by the Committee. In any commercial enterprise, the cost of services must, of necessity, be deducted as a cost of doing business. This is not the case in the Riker decision, and she is, as head of the local group, charged not with personal income taxes upon the gross gifts, nor upon the net gifts, but only upon the portion without deduction for any cost of labor ordinarily computed in determining actual net operating profits.

The record shows that during 1948, one of the years involved, actual title to this restaurant property vested in the church Committee, and the church Committee paid to the trustees in bankruptcy the consideration therefor. The Committee, not Riker, sold and received the proceeds from this property. The services of the 12 to 17 persons working and engaged in the church work in the San Bernardino group was not given to Mrs. Riker, and not intended for her in any way. Yet neither the cost of those services to the Committee, nor their value, is deducted in arriving at taxable income to Mrs. Riker, the related income of this group of 12 to 17 persons.

The decision on page 19 states that the taxpayers Grassmee and Riker are not entitled to the deduction under Sec. 23 (o), nor to the deduction under Sec. 101

Sub. 18. We read this to mean from the prior paragraph on page 18 of the decision, that those in the apostolic society do not have a tangible and definite interest in the religious apostolic society's common community treasury or its income, yet Sub. 18 is not a deduction of those in the society. Those in the apostolic society are taxed for a proportional share of its income. We pointed out that if the money was donated, it should not be taxed to the donor, and also the proportional share under the apostolic society also taxed to the same donor (double taxation). We think this portion of the decision bears careful analysis, as it creates unnecessary confusion as it now stands. Sec. 101, Sub. 18 does not deal with any deduction to any member of an apostolic society.

CONCLUSIONS.

The decision as it now stands has tremendous far-reaching implications and impact upon all religious organizations and the taxability of these organizations and the taxability of donations under Sec. 23 (o).

The effect of this decision and its far-reaching implications, and its impact upon the present concepts of law applicable to taxation of donations to churches, and exemption of religious organizations, is such that this decision merits the closest scrutiny by the three members of the court sitting in this decision, and we believe by the entire Court en banc.

The fact of ecclesiastical control of but one portion of a religious organization, has by the rule of this

case, tremendous implications. Not this one organization alone, and not these two taxpayers alone, will be affected by this decision. Almost all of the various churches that are now in existence in this country will be directly affected by this decision. The many donors to any of these various churches affected, will also be affected. The law in effect since 1950, 26 U.S.C.A. 511, where unrelated business income is taxed, and related business income is not taxed, recognizes that there is income from related business income. Congress in Sec. 26 U.S.C.A. 511 by excluding churches from the unrelated business income tax, shows Congressional intention in taxing charitable organizations, and excluding churches who do have unrelated business income. This decision has the effect of nullifying the acts of Congress, enacted subsequent to the years herein involved, and also of changing the law as to donations, under Sec. 23 (o), now renumbered but unchanged in substance, because a church may have either related or unrelated business income and not be taxable as an exempt organization. By this decision any church having any entity or subdivision subject to its ecclesiastical control or discipline that makes any charges or sales may not obtain donations subject to the ordinary charitable and religious deductions. This, in effect, strikes at the very life-blood of all religious activities.

By this decision, if any person attempts to assist in any religious work, and receives so much as room or board or other benefit to permit the party to undertake this work, it is in effect enuring to the benefit of

that individual under both the charitable and religious deduction section and the organizations tax exemption law. This, therefore, strikes at the very life-blood of any worthy cause, including all religious societies who must hire persons or pay their expenses to permit them to engage in the church work.

We respectfully submit that a rehearing should be granted in this case. We request a consideration en banc.

Dated, San Francisco, California,
May 13, 1957.

HOWARD B. CRITTENDEN, JR.,
Attorney for Appellants and Petitioners.

CERTIFICATE OF COUNSEL

I certify this petition is in my opinion and judgment well founded and meritorious and that it is not made for the purpose of any delay.

Dated, San Francisco, California,
May 13, 1957.

HOWARD B. CRITTENDEN, JR.,
Attorney for Appellants
and Petitioners.